SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 14

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN, APPELLANTS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

[fol. 1] **IN THE COURT OF COMMMON PLEAS FOR FRANKLIN COUNTY, OHIO**

No. 189395

[Caption Omitted]

PETITION FOR WRIT OF HABEAS CORPUS—March 1, 1954

To the Honorable Judge Joseph M. Clifford of said Court:

Harry A. Groban and Nathan Groban, petitioners, respectfully represent that they are in prison and restrained of their liberty by the Sheriff of Franklin County pursuant to order of Willis S. Peterson, Deputy Fire Marshal of the State of Ohio, without any legal authority but under the color of a pretended commitment for being guilty of contempt for refusing to testify before said officer in a hearing pertaining to a fire.

Petitioners say that said officer intends to examine them under oath pertaining to:

(a) An alleged criminal offense.

(b) Matters that are irrelevent or incompetent as to said alleged offense.

(c) Matters that effect the private business of the petitioners.

Petitioners say that they are not sure what their legal and constitutional rights are and therefore desire and need legal counsel to advise them at the hearing.

Petitioners say that said officer has stated that he, the officer, knows who committed the alleged offense, that he does [fol. 2] not suspicion the petitioners, but that the officer says he will compel petitioners to answer any and all questions asked.

Petitioners say that said officer is neither a judge or an attorney, nor versed in the competency or relevancy of testimony, nor is he apprised of the petitioners' legal and constitutional rights.

Petitioners say that said officer has served petitioners with a subpoena Duces Tecum to bring all of the books and

records pertaining to the operation of plaintiffs' business, and that said books will either be:

(a) Incompetent and irrelevant, or

(b) Used by said officer for the purpose of trying to incriminate petitioners.

Petitioners say that said officer has stated that the amount of the fire loss to be filed by the petitioners due to the fire will be considered by the officer as to who started the fire which is being investigated at this hearing.

Petitioners say that they are innocent of any criminal offense, that they are business men of good repute, and have offered and are willing to testify under oath fully as to anything they know about said alleged criminal offense if permitted to have legal counsel with them at this hearing. Legal counsel is desired for the sole purpose of advising petitioners as to the competency and relevancy of any question, and the legal and constitutional rights of the petitioners.

[fol. 3] Petitioners say they believe they have legal and constitutional rights to have legal counsel to advise them of their rights at all times and especially at this hearing.

Petitioners have refused to testify for the sole reason that said officer denies petitioners the right of legal counsel at the hearing.

Therefore, said Harry A. Groban and Nathan Groban pray that a Writ of Habeas Corpus issue to said Sheriff, that said Harry A. Groban and Nathan Groban will be brought before this Court and be discharged from said imprisonment and the restraining of their liberty.

(S.) Harry A. Groban, (S.) Nathan Groban.

Duly Verified.

[File endorsement omitted.]

[fol. 4] COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 189,395

DECISION—April 21, 1954

CLIFFORD, J.

Petitioners have invoked the jurisdiction of this Court by a petition in Habeas Corpus to obtain their release from incarceration in the Franklin County, Ohio, jail to which they were ordered committed by the State Fire Marshal by virtue of Section 3737.99 (A) Revised Code of Ohio for violation of Section 3737.12 of the Revised Code; for their refusal to be sworn and refusal to testify in the investigation of the fire at Dresden Mills, Inc. on January 22, 1954, at 12:30 A. M.

The pertinent facts, as alleged in the petition and disclosed by the record of the proceedings before the State Fire Marshal on March 1, 1954, are these: That Nathan Groban and Harry Groban were subpoen-ed by the State Fire Marshal, under Section 3737.11 of the Revised Code, as witnesses in an investigation. They appeared accompanied by their counsel, Mr. Ernest Graham. The Fire Marshal determined that the investigation should be private, under Section 3737.13 Revised Code, excluding Mr. Graham. [fol. 5] Nathan Groban and Harry Groban then refused to be sworn and testify, giving the exclusion of their counsel as the reason therefor. They were specifically apprised of the statutes setting forth the powers of the Fire Marshal, and still refused to be sworn, to testify, or to state whether they had complied with the subpoena duces tecum.

Thereupon, the Fire Marshal, by virtue of Section 3737.99 (A) Revised Code, committed them to the County Jail.

Counsel for petitioners raises the following issue:

Does the State Fire Marshal have the power to compel a witness to testify under oath after refusing the witness's request for his legal counsel to be present?

Counsel for petitioners contends that the State Fire Marshal has either exceeded his bounds in assuming too much power, thereby failing to exercise his functions within the meaning of the statute Section 3737.13, or, that said statute is unconstitutional. On the other hand, counsel for respond-

ents contend that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a valid commitment made by the State Fire Marshal in accordance with the law. Comprehensive briefs have been filed by both counsel to support their respective contentions.

The Court finds that the Opinion of the Attorney General, 1941, O. A. G. 3599, states that the law applicable to the case at bar, as follows:

> [fol. 6] "(1) When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G. C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.
>
> (2) The provisions of Section 832, General Code, authorizing and empowering an investigation conduced by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.
>
> (3) Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This privilege is a strictly personal privilege, to be claimed by the interested person.
>
> (4) The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine."

By virtue of the law, logically reasoned and established in said attorney general's opinion, this Court adopts such law as its own opinion as to what the law is and ought to be as applicable to the case at bar, and therefore, finds that the Sheriff of Franklin County, Ohio, is holding the petitioners, subject to bond set by the Court, pursuant to a [fol. 7] valid commitment made by the State Fire Marshal in accordance with the statutes, held to be constitutional by this Court.

The petition contains no allegation of fact which entitles petitioners to the relief sought. The relief prayed for is denied.

Bond set aside and petitioners remanded to custody.

(S.) Joseph M. Clifford, Judge.

[File endorsement omitted.]

[fol. 8] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Caption omitted]

No. 189,395

AFFIDAVIT OF PETITIONERS—Filed April 28, 1954

STATE OF OHIO,
Muskingum County, ss.

Harry A. Groban and Nathan Groban, Petitioners, being first duly cautioned and sworn, say that, at the time they were subpoenaed to appear before the State Fire Marshal at Columbus, Ohio, at that time they believed and still believe that the State Fire Marshal believed that Petitioners were guilty of causing said fire to be started and, therefore, were guilty of a criminal offense and would attempt to so charge them.

Further affiants sayeth not.

(S.) Harry A. Groban, (S.) Nathan Groban.

Duly Verified.

[File endorsement omitted.]

[fol. 9] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 5111

OPINION—October 8, 1954

Messrs. Graham, Graham, Hollingsworth, Gottlieb & Johnston, Mr. Ernest B. Graham, of Counsel, Citizens National Bank Building, Zanesville, Ohio, for Petitioners-Appellants.

Mr. Frank H. Kearns, Prosecuting Attorney, Mr. Earl W. Allison, Assistant Prosecuting Attorney, of Counsel, Courthouse, Columbus 15, Ohio, for Respondent-Appellee.

MILLER, J.

This is a law appeal from the judgment of the Common Pleas Court denying the appellants herein relief from a prison sentence on a writ of habeas corpus.

The record discloses that on January 22, 1954, a fire occurred on the premises of the Dresden Mills, Incorporated, Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the State Fire Marshal started an investigation as to the cause of the fire and pursuant to the same subpoenaed the appellants together with all the records pertaining to the operation of their business. [fol. 10] They appeared in accordance with the subpoena, accompanied by their counsel. The State Fire Marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented by their attorney. Thereupon the State Fire Marshal committed the appellants to the Sheriff of Franklin County, Ohio, to be incarcerated until they were willing to testify.

The error assigned is that the Court erred in its interpretation of Section 3737.13 of the Revised Code of Ohio, and that its judgment is contrary to law. This Section of the Code provides:

> "Investigation by or under the directing of the fire marshal may be private. The marshal may exclude

> from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The trial court held that under this section of the Code the Fire Marshal has a discretionary power to determine whether or not his investigation shall be in private and if so, that counsel for a witness may not be permitted to be present at the hearing. We think the Court properly construed the construction of the Code under consideration. The law seems to be well established that where a statute is plain and unambiguous the terms thereof shall be construed to have their ordinary meaning. It not only provides [fol. 11] that the investigation may be private but it goes further and defines the meaning of the word "private", to wit, "the marshall may exclude * * * all persons other than those required to be present * * *." Clearly, counsel for a witness is not a person whose presence is required before a fire marshal may proceed with the investigation; hence, his presence may be denied if so ordered by the marshal.

The next question presented is whether this statutory construction denies the appellants a right or privilege guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio. The appellants' brief states that "It is a fundamental principle that the first ten Amendments to the Federal Constitution are solely restrictions on the Federal Government and provide no limitations as to state governments." It states, however, that their interpretation should be valuable to the issues here by way of analogy. The cases cited, however, deal primarily with the principle of self incrimination which is not the issue in this case. It is not the contention of the appellee that the State Fire Marshal can compel a person called before him in an investigation to answer a question which would incriminate him. Therefore, the cases cited referring to these Amendments cannot be helpful in deciding the matter before this Court.

We shall next give consideration to Article I, Section 10 of the Ohio Constitution which provides in part:

> [fol. 12] "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * no person shall be compelled, in any criminal case, to be a witness against himself; * * *."

It is to be noted that the Amendment refers only to criminal cases, but the right of a witness in other proceedings to assert the privilege has been upheld in numerous cases. 42 O. Jur. 48. Therefore, whatever privileges are granted in criminal cases are also available to the appellants in this proceeding. It is merely an investigation for the purpose of determining the cause, origin and circumstances of the fire and whether or not a crime has been committed. The privilege is a personal one and does not extend to all questions which might be asked of a witness. The time for the assertion of the privilege is after the witness has been sworn and not before. State v. Cox, 87 O. S. 113. These appellants refused to be sworn and no questions were asked upon which the privilege could have been exercised. In the case of Burke v. State, 104 O. S. 220, the Court held that a witness is presumed to know his constitutional privileges and that it was not necessary that he be instructed on the same before answering incriminating questions. At page 229 of the Burke case, Chief Justice Marshall says:

> "It is claimed that Burke was not advised as to his constitutional rights, or cautioned against testifying to any matters which might tend to incriminate him. This privilege has always been treated as a personal [fol. 13] privilege to be claimed by the interested party, and in the absence of his claiming the privilege, or refusing to testify, he will be deemed to have voluntarily testified. We know of no authority or rule of law which makes it obligatory upon the grand jury or the prosecutor in charge of the grand jury to advise the witness as to his constitutional rights and privileges, or to caution him in any respect. In this matter, as in all other matters, the witness will be presumed

to know the law and therefore will be presumed to have knowledge of his constitutional rights and guaranties, and if he does not claim them without being cautioned the presumption arises that his testimony was voluntarily given."

If it was not obligatory upon those in charge of the grand jury to inform the witness of his privileges it would not seem that the presence of his counsel could be demanded for this same purpose in a somewhat similar proceeding. The same constitutional principles should be applied to investigations by a fire marshal as to those by a grand jury. In the case of the latter it will be noted that the statute prescribes that the prosecutor may be present and interrogate witnesses or advise on legal matters, but counsel for a witness is necessarily excluded. The fire marshal's investigation is one step removed from that of the grand jury. If he finds that a crime has been committed "he shall furnish the prosecuting attorney such evidence with the names of the witnesses, and a copy of the material testimony taken in the case." R. C. 3737.10. The reasons for secrecy before a grand jury are that it is in the furtherance of justice. 24 Am. Jur. 865. And it is for the same reason that R. C. 3737.13 was enacted permitting the fire marshal to conduct private investigations.

[fol. 14] We have examined the opinion of the trial court and are also in accord with the reasons he assigned in denying the writ to the appellants.

We find no error in the record and the judgment will be affirmed.

Wiseman, P. J., and Hornbeck, J., concur.

[File endorsement omitted.]

[fol. 15] In the Court of Appeals of Franklin County, Ohio

Judgment—Filed October 18, 1954

This cause came on to be heard upon notice of appeal, transcript of the original docket and journal entries, as-

signment of error, and briefs and arguments of counsel; and the Court being fully advised in the premises finds that there is no error apparent in the proceedings in the Court of Common Pleas nor in said record, and does hereby affirm the judgment of the Court of Common Pleas of Franklin County, Ohio.

It is therefore ordered, adjudged, and decreed that the judgment aforesaid be affirmed, and that the Writ of Habeas Corpus prayed for should be and the same hereby is denied. It is further ordered that the appeal bond staying the execution of the order of the Court of Common Pleas of Franklin County be and the same hereby is set aside. The appellants are hereby ordered to pay the costs herein.

To all of which the appellants except.

(S). Wm. C. Wiseman, Judge, (S.) Fred J. Miller, Judge.

[File endorsement omitted.]

[fol. 16] THE SUPREME COURT OF OHIO

Case No. 34244

IN RE: PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN ET AL.

Fire Marshal—investigations—may be private—exclusion of persons not required to be present—witnesses—not entitled to be represented by counsel—not compelled to testify against themselves—privilege against self-incrimination asserted, how—Section 3737.13 revised code, not violative of constitutional provisions.

OPINION—July 13, 1955

1. Under the provisions of Section 3737.13, Revised Code, the state Fire Marshal may conduct a private investigation to determine the cause of a fire, and he may exclude from the place where such investigation is held all persons other than those required to be present.

2. If the Fire Marshal determines that such investigation shall be private, a witness called to testify therein is not entitled to be represented therein by counsel.

3. In such investigation a witness can not be compelled to testify against himself.

4. To assert the privilege against self-incrimination, a witness must first be sworn.

5. The provisions of Section 3737.13, Revised Code, are not violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States or of the provisions of Section 10 of Article I of [fol. 17] the Constitution of Ohio relating to self-incrimination and the right to representation by counsel.

(Decided July 13, 1955.)

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

In the Court of Common Pleas the petitioners instituted this action for a writ of habeas corpus in order to secure their release from the county jail to which they were sentenced by the state Fire Marshal for refusal to be sworn or to testify in an investigation which that official conducted concerning a fire on the premises of the Dresden Mills, Inc., Dresden, Ohio, on January 22, 1954.

The relief was denied by the trial court.

On an appeal to the Court of Appeals on questions of law, the judgment of the Court of Common Pleas was affirmed.

The cause is in this court on an appeal as of right on the ground that a debatable constitutional question is involved.

WEYGANDT, Chief Justice.

The investigation by the state Fire Marshal was conducted under favor of Section 3737.08 *et seq.*, Revised Code.

The provisions under question in this action are those contained in Section 3737.13, Revised Code, which read [fol. 18] as follows:

"Investigation by or under the direction of the Fire Marshal may be private. The marshal may exclude from

the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

The reason given by the appellant petitioners for their refusal to be sworn or to testify was that the state Fire Marshal refused to permit them to have counsel present to represent them at the hearing.

The first contention of the appellants is that under the provisions of the above-quoted statute the Fire Marshal is not authorized to exclude counsel for a witness. However, the language is broad and provides clearly that "the marshal may exclude * * * all persons other than those required to be present." There is no intimation that counsel for a witness is required to be present.

The remaining contention of the appellants is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States and of the provisions of Section 10 of Article I of the Constitution of Ohio, the latter of which read in part as follows:

"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel [fol. 19] * * *. No person shall be compelled, in any criminal case, to be a witness against himself * * *."

As observed by the lower courts, there are several reasons why these provisions are inapplicable to the instant investigation. There is no "trial" or "criminal case" pending; there is no "accused party"; this matter is not pending in "any court"; self-incrimination is not involved, inasmuch as the Fire Marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is personal; and these appellants have not even been sworn, as this court held necessary in the case of State v. Cox, 87 Ohio St., 313, 101 N. E., 135, before the privilege can be asserted.

Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought.

Judgment affirmed.

MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, JJ., concur.

[fol. 20] IN THE SUPREME COURT OF OHIO

JOURNAL ENTRY OF JUDGMENT—July 13, 1955

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

[fol. 21] It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, That a special mandate be sent to the Court of Common Pleas of Franklin County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Franklin County, "for entry."

[fol. 22] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34244

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 10, 1955

I. Notice is hereby given that Harry A. Groban and Nathan Groban, petitioners-appellants, hereby appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Ohio affirming the judgment rendered by the Court of Appeals of Franklin County, Ohio, entered in this action on July 1, 1955. This appeal is taken pursuant to *28 U.S.C. 1257 (2)*.

II. The clerk will please prepare a transcript of record in this cause for transmission to the Clerk of the Supreme

Court of the United States, and include in said transcript the following:

1. Return in Court of Common Pleas, Franklin County
2. Entry—filing bond—Court of Common Pleas, Franklin County
3. Affidavit of Harry and Nathan Groban
4. Petition for Writ of Habeas Corpus
5. Precipe of preparation of record
6. Decision—Judge Clifford—Court of Common Pleas, Franklin County
7. Transcript of Docket and Journal Entries in the Court of Appeals of Franklin County
8. Entry fixing bond—Court of Appeals, Franklin County
9. Motion to dismiss appeal on law and fact
10. Memorandum of Petitioners-Appellants
11. Entry—Granting leave to perfect appeal
12. Opinion—Judge Miller—Court of Appeals, Franklin County

[fols. 23-24] 13. Entry—Court of Appeals, Franklin County

14. Entry fixing bond—Supreme Court of Ohio
15. Notice of Appeal to Supreme Court of Ohio
16. Precipe for Record
17. Motion to Certify Record
18. Assignment of Error
19. Motion to Dismiss
20. Entry overruling Motion to Dismiss
21. Entry overruling Motion to Certify Record
22. Final Entry Affirming Judgment
23. Opinion of the Supreme Court of Ohio
24. Transcript of Docket and Journal Entries

III. The following questions are presented by this appeal:

1. *Is Revised Code Sec. 3737.13* of the Laws of Ohio repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United

States; having been construed as to permit the Fire Marshal of the State of Ohio to exclude counsel for the petitioners—appellants while the latter are appearing before the Fire Marshal pertaining to the criminal act of arson?

2. Is *Revised Code Sec. 3737.13* of the Laws of Ohio repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States when construed in the light of the powers granted to the Fire Marshal of the State of Ohio by *Revised Code Sections 3737.01 to 3737.99* inclusive?

Ernest B. Graham, Attorney for Harry A. Groban and Nathan Groban, Petitioners-Appellants, Citizens Natl. Bank Bldg., Zanesville, Ohio—Phone GL-2-8484.

PROOF OF SERVICE (omitted in Printing)

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER RE: JURISDICTION—April 23, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Rule 16 (4). The parties are requested to discuss in their briefs and oral arguments this Court's jurisdiction to consider any questions raised by the possible applicability of In re Murchison, 349 U. S. 133, and In re Oliver, 333 U. S. 257 to the proceedings involved in this case.

April 23, 1956.